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No. 83-1684

In the Supreme Court

OF THE

United States

SERGIUS BRYNER and FRANCIS BRYNER, et al.
Petitioners,

vs.

SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, CAPITAL RESERVE LEASING CORPORATION, C.I.T. CORPORATION, and LEASCO CAPITAL EQUIPMENT CORPORATION,
Respondents.

PETITIONERS' REPLY BRIEF

ALVIN H. GOLDSTEIN, JR.
COUNSEL OF RECORD
LAWRENCE A. CALLAGHAN
GOLDSTEIN & PHILLIPS
A Professional Corporation
Three Embarcadero Center
Suite 2280
San Francisco, CA 94111
(415) 981-8855
ROBERT R. ELLEDGE
LAW OFFICES OF
ROBERT R. ELLEDGE
A Professional Corporation
P.O. Box 852
Modesto, CA 95353
Attorneys for Petitioners

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1. Exercise of Article III powers by a magistrate. Respondents' opposition emphasizes the illusory feature of 28 U.S.C. §636(c), i.e., "control by Article III judges" over a magistrate's exercise of judicial power. Such "control", however, is not automatic and to operate at all must be invoked or exercised sua sponte. In practical terms, "control" is non-existent. Moreover, appellate review does not satisfy "the institutional concerns of Article III". The standard of review for a judgment entered by a magistrate is the same as for judgments entered by Article III judges and does not purport to constitute trial de novo or the equivalent of proceedings essential to the entry of judgment. This Court holds that constitutional requirements for the exercise of judicial power must be met at all stages of adjudication. Northern Pipeline v. Marathon Pipeline, 458 U.S. 50, 71 (1982).

Article III demands are satisfied only when "the ultimate decision is made by the district court." United States v. Raddatz, 447 U.S. 667, 683 (1980).

Here, as in the two other certiorari petitions currently pending before the Court,[1/] "the ultimate decision" was made by a magistrate lacking the essential attributes of an Article III judge. Northern Pipeline, supra, 458 U.S. 59. This Court has concluded that it is "the inexorable command" of Article III that "the judicial power of the United States must be exercised by courts having the attributes prescribed in Article III, i.e., life tenure and fixed compensation. Northern Pipeline, supra, 458 U.S. at 58.

28 U.S.C. §636(c) makes pretensions

1/ Collins v. Foreman, certiorari 83-1616; Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., certiorari 83-1873. We are informed that a fourth petition raising this issue is to be filed in Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 2/29/84).

to constitutional adequacy by providing for litigant consent and allowing for district judge intervention. Yet, these provisions are makeweight, not meaningful in the real life environment of the district court where subtle pressures exist to consent, and district judge participation is unlikely. The "consent" and "control" provisions lack substance in a constitutional context and, as the instant case illustrates, the judicial power of the United States, once exercised by a magistrate in the manner allowed by Section 636(c), is effectively lost to the district court. If meaningful control by an Article III judge were possible, Section 636(c) would not have been enacted. It is an expedient.

As noted in our petition, the issue is recurrent. There are now pending in this Court three certiorari petitions addressing this identical issue: Collins

v. Foreman, certiorari 83-1616; Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., certiorari 83-1873; and the instant petition.

2. The magistrate's award of attorneys fees without a hearing ignores controlling principles of California law, federal policy and due process. [A.] Respondents' opposition misconstrues California law. The California Supreme Court considers public policy when interpreting a fee clause in a contract. Ecco-Phoenix Electric Corp. v. Howard J. White, Inc., 1 Cal.3d 266, 272 (1969). In Ecco-Phoenix, the court looked at "the oppressive nature of a literal interpretation of the [fee] clause." 1 Cal.3d 272. See also International Industries, Inc. v. Olen, 21 Cal.3d 218 (1978) giving effect to equitable principles and public policy considerations in the judicial interpretation of fee clauses.

The magistrate's orders and the Ninth Circuit memorandum ignore the California Supreme Court and rely upon a decision of an intermediate appellate court as the source of California law on this subject. It is not. The case, Wagner v. Benson, 101 Cal.App.3d 27 (1980), also ignores the California Supreme Court, but is cited by respondents, the magistrate and the Ninth Circuit to justify the error that has resulted. Wagner is an aberration when applied to these facts. At best, the case is an incomplete reflection of California law. Wagner does not cite the controlling California cases relating to interpretation of attorneys fee contracts. Ecco-Phoenix, supra, and International Industries, supra. Nor does Wagner refer to California Civil Code §1636 requiring that all contracts be interpreted in accord with the mutual intention of the parties at time of contracting.

The trial court, respondents and the Ninth Circuit ignore Sciarrotta v. Teeford Construction Co., 110 Cal.App.3d 444, 451 (1980) decided after Wagner and which is contra to Wagner. (See Petition.)

Similarly, respondents, the magistrate and the Ninth Circuit ignore national policy. This Court has asserted that it is "national policy" to "minimize the cost of litigation" Farmer v. Arabian American Oil Co., 379 U.S. 227, 234 (1964), and that allowance of all costs of litigation is appropriate "only in exceptional cases and for dominating reasons of justice." Sprague v. Ticonic National Bank, 307 U.S. 161, 167 (1939).

The Ninth Circuit ignores its holding in United States v. Mountain State Construction Co., 558 F.2d 259, 263 (9th Cir. 1978), requiring a trial court to exercise discretion in accord with equitable principles when interpreting a fee clause in a

contract. More importantly, vis-a-vis, national policy, the magistrate and the Ninth Circuit ignore the fact that the securities acts, which were central to petitioners claims against respondents, do not permit an award of attorneys fees, absent a show of bad faith. Junker v. Crory, 640 F.2d 1349, 1364-5 (5th Cir. 1981).

[B.] A hearing should have been held. Respondents speculate that even if a hearing were conducted, petitioners would not have prevailed because no disputed issues of fact had been raised. The fact is that petitioners did serve post-trial deposition subpoenas duces tecum for respondents' attorneys fee records (CR 1862-64) and filed written opposition to respondents' fee applications. (ER 55, 65). Moreover, petitioners requested a hearing and the magistrate's orders expressly promised one. Substantial property rights

were involved and a hearing should have been held.

Respondents opposition complains that petitioners have presented "only legal and policy arguments", rather than "factual opposition to the fee applications". Op.Br.11. The refusal of the magistrate to conduct a hearing and the Ninth Circuit to consider petitioners' "legal and policy arguments", or to order a hearing, has kept the evidentiary facts waiting in the wings.

3. Announcement of numerical division was a product of judicial inquiry. On May 13, 1981, without notice to, or advice of, counsel, the magistrate called the jury into the courtroom and said:

> "I am just trying to get an idea how we stand in numbers...Is there a general posture of the jury that there are so many voting one way and so many voting another on all issues...do we have variations?...Two agree on this one, but the next time down, four agree? How does that work?" RT 21945.

The jury foreman's response to this explicit request for numerical division was: "In every case, four jurors agree on everything." RT 21945.

Thus, the jury did not "volunteer". Numerical division was specifically asked for. Only a failure to examine closely the record or undue reliance upon the respondents' briefs could have led the Ninth Circuit to conclude that "the judge did not directly ask for numerical division". This distortion of the record is the fruit of respondents' effort to avoid Ninth Circuit holdings in United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979), and of this Court in Brasfield v. United States, 272 U.S. 448, 450 (1926).

The so-called "waiver" that respondents are talking about is found in an argument made by one of petitioners' attorneys five days after the incidents of jury coercion complained of here, and in

another context. In colloquy, the magistrate "rejected further assistance to the court" to see what the jury would do "without further error by the court, error that is alleged to occur no matter what I do." RT 21977. The magistrate did not consider the "error" waived and there was no consent to, or waiver of, what occurred.

Finally, respondents cite two cases for the proposition that "the Brasfield rule is inapplicable to civil cases." Op.Br.12.[2/] Both are inapposite and one expressly supports the proposition that the Brasfield rule does apply to civil cases. Chicago, Rock Island, a civil case, does not cite Brasfield but does follow the Brasfield rule. The Tenth Circuit holds that the trial court's inquiry

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2/ Chicago, Rock Island & Pacific Rr. Co. v. Hugh Breeding, Inc., 247 F.2d 217, 227 (10th Cir. 1957); Maloney v. Tunnell, 218 F.2d 705, 709-11 (3rd Cir. 1955).

about numerical division, together with the supplemental instructions, "was calculated to wrongfully coerce the jury and...the inquiry should not have been made." 247 F.2d at 227.

Nor does the second case, Maloney, hold that the Brasfield rule is inapplicable to civil cases. Rather, the Third Circuit concludes that there was no coercion in that case "by any stretch of the imagination." 218 F.2d 711.

4. The jury verdict was not unanimous. When a juror answers a poll saying "In order to get a unanimous vote I voted yes" (RT 21982), and the trial judge responds by telling the juror he must say "yes" or "no", it is obvious that the juror is going to say "yes", just as he did in the jury room and for the same reasons.

THE COURT: Either it is your verdict, or it is not your verdict, and it must be an unqualified yes or no.

JUROR: I gave it that way, sir.

THE COURT: Well, what is your verdict, sir; yes or no?

JUROR: Yes.

THE COURT: All right, thank you. (RT 21985)

Three requests were made by petitioners' attorney for clarification. RT 21984, 21985, 21986. The jury was discharged over objection of petitioners' counsel. RT 21986. Respondents rely upon two cases, neither of which support their position. In Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971), the trial court did ask the juror for an explanation of her ambiguous answer. The Second Circuit says that evidence of coercion, combined with the juror's expression of uncertainty, would have supported the granting of a mistrial. The instant case is not one of uncoerced acquiescence, but rather a case in which a series of coercive events culminated in a non-unanimous verdict.

In Roy v. Star Chopper, Inc., 584 F.2d 1124 (1st Cir. 1978), the second case cited by respondents, the juror did not express doubt over the verdict, but said she would like to ask someone a question, whereupon the court told her to answer the question put to her. When she answered, the judge inquired as to whether his inquiry was "clear enough to you." 584 F.2d 1136. The First Circuit notes, quite consistently with petitioners' position here, that "it is the court's function to determine solely whether the verdict represents the juror's position..." 584 F.2d 1136.

That is all petitioners asked the magistrate to do in the instant case, not to inquire into the reasoning process or motivation behind the verdict. The purpose of the affidavit was not "to impeach the verdict", but to determine whether the verdict represented the juror's position. An affidavit of a juror is admissible to

show either the true verdict or that no verdict was reached at all. Fox v. United States, 417 F.2d 84, 89 (2nd Cir. 1969).

5. The issues raised by Federal Rule of Civil Procedure 60(b)(3) were not decided by the jury and the magistrate did not consider those issues, except in the context of attorneys fees. The extent of the alteration and destruction of evidence did not begin to unravel until mid-trial. The issue presented was not for the jury at all and neither the magistrate nor the Ninth Circuit has fully considered those issues.

It is not "fanciful" (Op.Br.6) to say that the bank "reconstructed" its records and files when the bank admits that this is precisely what it did. It is hardly "fanciful" for petitioners to contend that originals of the banks' primary historical document were destroyed when the bank admits that all were destroyed. RT 17070.

These particular documents were central to the bank's defense that the transactions in question were "ordinary commercial loans". The documents, according to the bank's own testimony, "tell what actually happened" (RT 18237).

Respondent contends in opposition that the originals "had apparently been routinely destroyed." Op.Br.16. However, two bank officers testified that the originals should have been in the files produced in court. RT 15401, 16094. But, says the bank, this destruction "did not hide the facts or deceive anyone since identical photocopies were available in the files and were offered in evidence." Op.Br.16. Yet, as respondent acknowledged at trial it was a "everyday" practice to take these "identical photocopies" out of the file and to alter them (RT 15529-30), i.e., "photocopy a part of the CCR and complete the rest" and "cut and paste an

old CCR and make up a new one". If a change was desired, a bank officer would write something on a copy and give it to the secretary and she would type a new CCR: "If I desire to do that, that's exactly what I did, yes." RT 15604. It was historical revisionism and the date on the revised document would make it appear to be a copy of the original prepared contemporaneously with the event. Such "changes" could be made as long as two years after the original had been destroyed. RT 15604-5.

Since the photocopy would not disclose the "changes" or the "whiting out" or the "paste-up", the bank's assertion that these were "minor changes" and that they were not "recreating a new form from scratch" (Op.Br.16) should fall on deaf ears. The self-proclaimed "identical photocopies...available in the files and...offered in evidence"

(Op.Br.16) were, in fact, self-serving facsimiles, utilized by the bank to support its "ordinary commercial loan" defense at trial.[3/]

Respondents' argue that the Ninth Circuit did not discuss this issue because it was non-reviewable, absent an abuse of discretion. Op.Br.17. This is absurd. The issue was reviewable. The Ninth Circuit simply said that undiscussed issues, while not lacking in merit, were not pivotal. As we point out in our petition, the issue was pivotal and clearly not lacking in merit. It is an appropriate

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3/ A close reading of the two full paragraphs at page 16 of the opposition brief reveals the transparency of the bank's rejoinder. There was no way of knowing whether "the bank did not destroy or throw away documents when reorganizing the files" because the only thing left to discover was the reorganized file, the reorganization of which was concealed from plaintiffs. Further, the assertion that "identical photocopies of credit commitment reports were in the files, carefully avoids the admitted fact that these were not identical photocopies of originals, or if they were there was no original to compare them to.

subject for the exercise of this Court's supervisory powers. The fundamental facts are surprisingly undisputed, indisputable, and belatedly admitted.

6. The magistrate had no basis for directing a verdict on National Bank Act defenses hinged to bank conduct that undermined the purpose of the Glass-Steagall Act. Respondents concede that "the intent and purpose of the National Bank Act was to protect the solvency of national banks". Op.Br.19 The promiscuous granting of investment loans, particularly in energy-related fields such as oil and gas, is at the foot of numerous bank failures, most recently Continental Illinois, an event that adversely affected securities and bond markets. These events dramatize the need for enforcement of the provisions of the National Bank Act. Violations of the kind that occurred here, through the irresponsible use of bank cus-

tomers, as borrowers, to capitalize a fraudulent scheme, should not be rewarded.

Respondents' assertions to the contrary notwithstanding, the operative facts are undisputed and well documented and there is no requirement that they must fall within the ambit of seller liability under Section 12 of the 1933 Act in order to constitute a violation of Glass-Steagall.

CONCLUSION

Respondents' assert that "each of the issues turn upon facts which have been found in favor of respondents by the jury". Op.Br.2. Not so. Question 1 relating to the exercise of Article III powers by a magistrate was not a jury question. Question 2 relating to attorneys fees was not a jury issue and petitioners never had a hearing with respect to attorneys fees and non-statutory costs. Question 3 relates to the trial

court's handling of the jury and, by definition, does not turn upon facts decided by the jury. Question 4 involves jury unanimity and was not a jury question. Question 5 relates to Rule 60(b)(3) F.R.Civ.P., which was raised by post-trial motion and not submitted to the jury. Question 6 involves Glass-Steagall Act defenses which were taken from the jury by directed verdict.

Petitioners have eliminated issues that could cast this Court "adrift in a sea of conflicting testimony" (Op.Br.7), raising only those key issues that are crystallized by incontrovertible fact.

DATED: June 1, 1984.

Respectfully submitted,

ALVIN H. GOLDSTEIN, JR.
Counsel of Record

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